

MEETING
STATE OF CALIFORNIA
THE RESOURCES AGENCY
CENTRAL VALLEY FLOOD PROTECTION BOARD

STAKEHOLDER MEETING
AMENDMENT OF CENTRAL VALLEY FLOOD PROTECTION
BOARD'S TITLE 23 PROPOSED REGULATIONS

RESOURCES BUILDING AUDITORIUM
1416 9th STREET
SACRAMENTO, CA

THURSDAY, JUNE 12, 2008

12:59 P.M.

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APPEARANCES

PRESENTING STAFF

Ms. Deborah M. Smith, Deputy Attorney General

Ms. Nancy Finch, Staff Legal Counsel

Mr. Dan Fua, Supervising Engineer

Mr. Geoff Shumway, Staff Analyst

BOARD MEMBERS PRESENT

Mr. Francis "Butch" Hodgkins, Vice-President

Ms. Maureen "Lady Bug" Doherty, Secretary

Mr. John W. Brown, Member

ADDITIONAL STAFF PRESENT

Mr. Jay Punia, Executive Officer

ALSO PRESENT

Mr. Dante John Nomellini, RD17, et al

Mr. Tom Eres, Hofman Ranch

Mr. Scott Shapiro, Central Valley Flood Control
Association, Three Rivers Levee Improvement
Authority, and Sacramento Area Flood Control Agency

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1 P R O C E E D I N G S

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3 DEPUTY ATTORNEY GENERAL SMITH: I guess we'll
4 go ahead and get started.5 Thank you ery much for attending our
6 stakeholder meeting for the Central Valley Flood
7 Protection Board. My name is Deborah Smith. I'm with
8 the Attorney General's office, and I advise the Board
9 along with Virginia Cahill.10 To my right is Nancy Finch. She's the senior
11 staff counsel who also advises the Board. And to my
12 left is Dan Fua, Supervising Engineer for the Board.13 And we also have three Board Members with us
14 today who are here to observe and support: Board
15 Member Doherty, Board Member Brown, and Board Member
16 Hodgkins. Thank you very much for being here today as
17 well.18 This is the first step in -- it's more of an
19 informal step in the regulations, overall larger
20 regulations process. This is an opportunity to give
21 members of the public the opportunity to give us their
22 comments on our proposed draft.23 And I emphasize draft because these
24 regulations, copies of which I think everyone here has
25 but that are out in front, will be going to the Board

1 for comment and their approval probably in July or
2 August, but I'll go over the proposed time lines for
3 the process a little bit later in our presentation.

4 Like I said, the purpose today is to get input
5 from the public so that we can revise if appropriate
6 and accordingly before we bring these regulations to
7 the Board for their review.

8 The way I will do this is we will go over very
9 briefly what the proposed drafts, what sections we are
10 proposing to change, and what those changes will do.

11 And then we will go over a time line of the
12 overall regulations process.

13 Then we'll allow you all the opportunity to
14 give us your comments going through the regulations one
15 by one to see if anyone has any comments on them.

16 So with that, the first set of regulations
17 that we're proposing are dealing with evidentiary
18 hearings. And these were initiated by legislation,
19 Assembly Bill 5 that was effective as of January 1st of
20 this year.

21 And Water Code section -- as part of that
22 bill, Water Code section 8610.5 says that the Board
23 shall adopt regulations relating to evidentiary
24 hearings pursuant to chapter 4.5.

25 The legislation requires -- I'm sorry.

1 Section 13 is -- the amendments we're proposing would
2 require an evidentiary hearing for any matter that
3 requires the issuance of a permit unless otherwise
4 provided by law.

5 It adds references to it, and later there is a
6 regulation that creates a Consent Calendar.

7 It also creates a process for the Board to
8 ratify -- if it so chooses to use a Hearing Officer for
9 these permits -- to ratify the Hearing Officer's
10 decision.

11 And also makes a reference to specific
12 procedures for hearings which are set forth in our
13 proposed regulation section 13.1.

14 And then it also specifies what items should
15 be included in the Notice of the evidentiary hearing.

16 Then the next section we propose is section
17 13.1 which deals more specifically with the conduct and
18 order of evidentiary hearing proceedings.

19 So this is really the procedural regulations
20 that incorporates the informal hearing procedures of
21 the Administrative Procedure Act which is in chapter
22 4.5 of the APA, and that includes the opportunity to be
23 heard and to present and rebut evidence.

24 So it's a pretty specific statute that you can
25 read for yourself, but it basically specifies the order

1 of presenting and rebutting evidence, what procedures
2 to use in order to get evidence before the Board, and
3 so that it becomes a part of the record. And it also
4 establishes procedures for the Board to adopt the
5 written conclusions for these hearings, and it also
6 establishes procedures for language assistance for
7 hearings.

8 We would propose to add a new section 13.2
9 that would create procedures for a Consent Calendar
10 which would allow a summary proceeding, essentially.
11 And it would be regulations basically set out when an
12 item can be placed on the Consent Calendar and when the
13 Board may vote on a Consent Calendar item.

14 So those are the sections we propose to add
15 clarifying evidentiary hearings.

16 The next section that we propose regulations
17 for is to implement Water Code section 8578, which was
18 also part of Assembly Bill 5 and took effect on
19 January 1st dealing with ex parte communications.

20 It sets forth some definitions in Water Code
21 section 8578 so it defines -- the regulation would
22 define matters under the Board's jurisdiction. It
23 would define what is a procedural matter. It does
24 clarify when and how the Board should take field trips
25 and would also clarify how the Board would comply with

1 disclosure requirements if that situation were to
2 arise.

3 We would propose to amendment section 15 of
4 Title 23 which discusses basis for denial of
5 applications.

6 It would add section A9 which would give the
7 Board another basis as a reason to deny a permit if it
8 would adversely -- if the proposed work would adversely
9 affect the State Plan of Flood Control.

10 This also comes out of AB 5. Water Code
11 8610.5(c) discusses four findings that the Board has to
12 consider when considering a permit application, and the
13 third of those discusses the State Plan of Flood
14 Control.

15 And as you probably know, the State Plan of
16 Flood Control was created as a part of the flood
17 legislation that came out this year as well.

18 The next two amendments that we propose deal
19 with delegations and delegation authority. Section 5
20 we propose to amend to clarify under what circumstances
21 the Board may delegate matters to the Executive
22 Officer. And again this is to come into conformance
23 with AB 5's requirement for evidentiary hearings.

24 In addition to that, section 109 of Title 23
25 discusses -- this is basically a cleanup measure to

1 update that section to incorporate the most recent
2 delegation order that was passed by the Board on
3 April 21st, 2006.

4 So those regulations that I have covered
5 mostly deal with the reaction to the new legislation
6 that came out and was effective as of January 1st of
7 this year.

8 Ms. Finch will be discussing some other
9 changes that we propose at the same time.

10 SENIOR STAFF COUNSEL FINCH: As a way of
11 introduction, I want to say I have material to go
12 through that is the cleanup and technical changes
13 aspect to this cycle of regulatory changes because
14 historically the history of these regulations is they
15 were drafted with the notion that updates would be
16 needed, amendments would be needed, but it has been
17 quite an onerous task and so it has not been done on a
18 regular basis. So some minor changes that need to be
19 done will be in this phase.

20 Then there will be a second phase with changes
21 that need more time, need more analysis, comments from
22 the public, from you all, that we've been soliciting,
23 people who know the regulations, work with them, and
24 have some very good comments. Those will be in the
25 next phase.

1 And I know we've already received some very
2 good comments, and we do appreciate those and continue
3 to solicit comments for the next phase of the
4 regulatory changes.

5 So I'd like to turn to what I will be going
6 over. And the first group, I do not have a PowerPoint
7 because it didn't lend itself to that, I think it's out
8 of order in the packages you have. It may be out of
9 order. It's the cleanup of minor technical changes
10 starting with section one, Authority.

11 And I thought we could just flip through them
12 because it truly is just cleanup where we're changing
13 the name from Rec Board to Central Valley Flood
14 Protection Board. And same thing on page 2, page 3.

15 And the one section which may be a bit of an
16 addition is 8(a). And that is being added due to
17 requests from some groups who want to propose a joint
18 application to different processes within government,
19 and it allows for the Board to consider that upon
20 request.

21 And then the next section I would like to go
22 over is proposed regulatory changes titled -- to Title
23 23 Waters amending 120(a)(5) and adding section 138.

24 And the 120(a)(5) has been before the Board
25 one or two times and in different ways. And this is

1 the language that we're heading towards that we have at
2 this point. And you can read that, I won't read it for
3 you. But it does help define the levee toe -- I'm
4 sorry; the easement.

5 And then section 138 is the new section
6 addressing some issues that have come up recently where
7 the Board can define limits of flood control work.

8 So that's the language that we're ready to
9 present at this point pending public comment and see if
10 we have any necessary changes.

11 Then continuing with the cleanup and minor
12 technical changes is Appendix A. That continues the
13 basic changes of the name and any other deletions that
14 would make it consistent with the new regulations -- I
15 mean the new legislation.

16 And then the last proposed change is to Table
17 8.1, and it's adding a stream to the table, changing
18 limit descriptions. I don't know if we have any
19 additional comments on this. It's self-explanatory. I
20 haven't been working this, but I included it in what I
21 would present.

22 So I'd like to hear comments, and that's what
23 we have so far.

24 DEPUTY ATTORNEY GENERAL SMITH: I'll go
25 briefly over the time line for these.

1 I won't even attempt to go through this, just
2 to give you an idea. Probably many of you are familiar
3 with the regulations process already, but it is a
4 statutory process that we go through that's dictated by
5 the Administrative Procedure Act.

6 But the good news is there's lots of
7 opportunity for public input and public comment, and
8 this is really just the first step in that process.
9 It's an informal step that's not required by the code,
10 but it is an important part because we would like to
11 get comments as soon and as often as possible.

12 Just to give you an idea of at least the
13 approximate dates that we have in mind at this point in
14 time is that we intend to come to the Board, the full
15 Board, either at the July or August meeting with our
16 final proposed drafts of the regulations.

17 And at that point, there will be another
18 opportunity for public comment before the full Board,
19 and they will make changes, amendments as they see fit,
20 and then hopefully either approve a format for us to
21 publish in the Office of Administrative Law register.

22 And that initiates and starts the formal
23 regulations process where there's a 45-day -- once it
24 gets published, there's a 45-day public comment period
25 where that's the actual formal public comment period.

1 Within that 45 days, we would be holding --
2 proposing to hold a public hearing on the regulations
3 which would probably be again either August or
4 September or as soon thereafter as we could to bring it
5 back to the Board within that 45-day public comment
6 period.

7 Then from there, once the hearing occurs,
8 staff will take all of those comments into
9 consideration and if necessary or appropriate will make
10 changes and bring those changes back to the Board for
11 their final approval.

12 Once they are approved by the Board, then the
13 entire package of regulations gets transmitted to the
14 Office of Administrative Law. They can either reject,
15 approve, or make suggestions for changes.

16 Then once that process is all complete, from
17 the time of the original public notice, we have one
18 year before that public period expires to where we can
19 send those to OAL for hopefully their approval.

20 Then they become law 30 days after they're
21 approved by OAL.

22 So it is quite a process but the point I want
23 to make is to highlight the key dates and to highlight
24 the fact that there will be numerous opportunities to
25 come back to make input.

1 I also think it's important, though, to
2 encourage you all to remain engaged -- and I'm sure you
3 will -- in the process because there very likely will
4 be changes along the way.

5 So this is your first opportunity, and we are
6 anxious to hear from you.

7 So with that -- it's been suggested we go
8 through the regulations in chronological order and see
9 if anybody has comments on them that way. And that
10 sounds fine to me. Or you can each just come up and
11 give your comments on all of them.

12 And if you could, just as at a regular board
13 meeting, state your name.

14 MR. NOMELLINI: I'm Dante John Nomellini. I'm
15 an attorney. I represent numerous districts in the
16 Delta and in particular Reclamation District 17 which
17 is an urban district.

18 I don't have any significant problems with the
19 proposed language. I don't understand what a joint
20 permit is. Maybe somebody can define that. I know
21 you've created a new term here, a joint permit, and I'm
22 not sure that it has significant relevance to my
23 clients.

24 I had the opportunity to go on a tour, and
25 Nancy was in the same van I was in. So she mentioned

1 she was working on regulations, so I sent her a letter
2 suggesting some areas that I think need your attention
3 related to the regulations.

4 And I'd like to go through those briefly, if I
5 may, whoever the Hearing Officer is here I guess is
6 right at this table. I want to deviate a little bit
7 and touch upon these if I may. If I'm imposing on
8 somebody else's time frame, I will yield and come up at
9 the end.

10 I have copies of what I mailed. I'd like to
11 submit those.

12 The first area of concern I'd like to touch
13 upon is the difficulty we at the local level have
14 dealing with encroachments.

15 The regulations of the Board allow you to
16 grant permits, even if they're not endorsed or
17 supported by the local agencies.

18 We also have easements -- the local
19 reclamation district holds some, but the basic
20 easements for the levee system, the project levees, are
21 held by the Sacramento-San Joaquin Drainage District
22 which is you people.

23 When it comes to enforcing, when our levees
24 are inspected and we get a write-up on the inspection
25 report, and some of them say encroachment, station

1 such-and-such, unpermitted encroachment, the agreement
2 we have with the Reclamation Board, now you the Central
3 Valley Flood Protection Board, provides that you have
4 the authority to jointly use our easements. It does
5 not provide that we, the maintaining agency, have the
6 authority to utilize your easements.

7 We of course have to maintain the levee, and
8 it's implied we have the authority. But when we
9 encounter seasoned encroachers who are well
10 represented, the legal issues become important.

11 And therefore, I attempted years ago to reach
12 accord with Ward Tabor who fortunately is back from
13 vacation, saw him at another meeting, and trying to
14 work out an agreement where we would make that clear,
15 at least in RD17, because we have some encroachments
16 that need to be addressed.

17 And we didn't get far with it, but it was
18 simply to say that we, jointly, we agree that our new
19 easements that we acquire, that you acquire, the past
20 easements, are all joint use.

21 I think that could be dealt with in
22 regulation. But it's a subject that needs to be
23 addressed.

24 We also in our present situation where we do
25 have encroachments, if you are not going to enforce the

1 regulations and you expect us to react to the
2 inspection report, then we need at least some direction
3 from you or mandate that says go take care of them,
4 you're authorized to do so, you know, pursuant to our
5 authority.

6 It's an area that needs to be addressed and
7 more importantly today than ever before because of the
8 more intense scrutiny with the Corps of Engineers
9 upping their standards for inspection and their
10 requirements.

11 Encroachments are a big deal now. They were
12 not as critical in the past. So I would urge that we
13 all try and address this in a more legalistic manner.

14 We have one example in RD17 that's kind of a
15 notorious one. A landowner put grapes on the levee
16 years ago, and your Board or predecessor said no, we're
17 not going to grant a permit; Attorney General, you go
18 enforce.

19 Attorney General did not enforce. And
20 therefore we have a complete adjudication by your Board
21 of this inappropriateness of this encroachment, yet we
22 have no mechanism, no enforcement.

23 Now when we, the local district, tell the guy,
24 hey, you got to come in and get a permit because the
25 guys -- the inspectors are writing it up on our

1 inspection report, and he says, hey, the State Attorney
2 General said it was okay.

3 Well they really didn't say it was okay; they
4 didn't follow through on the prosecution.

5 And this same person has got another planting
6 on the levee and a gate, and we're trying to get him to
7 comply, so we have this Never-Never-Land.

8 We need help and direction, and we need to
9 move on it. If you're not going to move on it, we'd be
10 willing to move on it. But we need direction and
11 authority to do it.

12 Another area I'd like to talk about briefly is
13 I think somebody adopted a code section that hampers
14 your rights under the easements and therefore creates
15 an implication that there has to be some special
16 findings before you can remove unpermitted
17 encroachments. And I called it to Nancy's attention.
18 It's section 8709.4.

19 I think that needs legislative cleanup because
20 it clearly runs contrary to your easement rights. And
21 it says you can remove fences, gates, and vegetations
22 on levees; but the -- what about basketball courts,
23 sheds, docks, ramps, gazebos, swimming pools, and a
24 whole raft of other unpermitted things?

25 Why should you have to make findings that they

1 encroach on the flood -- you know, when you have
2 property rights in the form of an easement that gives
3 you the right to require that all these things be
4 permitted.

5 So I think that was a bad piece of law that
6 needs to be addressed.

7 The last area I want to touch upon is that
8 your jurisdiction is asserted primarily with regard to
9 project levees and those areas that directly affect
10 flood projects. You can broaden your authority, but
11 when we get out into the nonproject area of the Delta,
12 away from your project levees, you currently don't
13 care.

14 I mean one time you issued permits for
15 encroachments, then that was discontinued after the
16 Andrus Island levee break in the '70s. And I ran into
17 a situation where PG&E wanted to put in a gas line, and
18 their contention was -- and it was upheld by at least
19 the trial court -- that the PUC and the utilities, all
20 utilities, are exempt from local regulation.

21 That means the local Reclamation District does
22 not have authority to require a permit for a levee
23 encroachment from a utility.

24 There is no such exemption with regard to
25 State authority. So I would suggest that this Board,

1 at the very least, make a review of utility crossings
2 on nonproject levees.

3 I don't think you can delegate it to us the
4 way the law is. I think you have to pay attention to
5 it.

6 The other thing is, as some of you know, that
7 the popular way of installing pipelines today under
8 levees or whatever is with horizontal directional
9 drilling.

10 Your regulations provide for an exemption of a
11 permit requirement if it's 50 feet below the levee. I
12 think it's 50 or might be 30. Whatever it is, it is an
13 exemption.

14 In the courtroom, that regulation was cited
15 for the proposition that a pipeline buried more than
16 that depth would have no significant effect on the
17 levee and would require no permit.

18 And as a matter of fact, this horizontal
19 directional drilling is capable of fracturing the
20 levees very easily in the foundations because the pumps
21 have like a thousand pounds per square inch capability,
22 and what determines what happens is the drilling
23 pressure at the head.

24 It was impossible, supposedly, to occur in the
25 situation I was involved in with the expert testimony

1 because it was 90 feet. The pipeline was buried
2 90 feet. Fracturing did occur. Drilling fluid came up
3 to the surface, contrary to the technical testimony of
4 the PG&E representatives.

5 But I think the moral of the story is you've
6 got to pay attention to these things. Somebody's got
7 to pay attention to what goes on. If a utility takes a
8 high-handed position, runs over the top of the local
9 Reclamation District, nobody's making that review.

10 So I would urge that you consider stepping out
11 into the field of regulation of utility crossings on
12 nonproject levees.

13 Anyway, that's the sum and substance of my
14 comments to you. It's more in the nature of what
15 should be done outside of this scope of what's before
16 you today.

17 Thank you.

18 If there are any questions, I'd be happy to
19 attempt to address them.

20 DEPUTY ATTORNEY GENERAL SMITH: Thank you very
21 much. We have a card from Tom Eres?

22 MR. ERES: Tom Eres representing Hofman Ranch,
23 legal counsel. Thank you for the opportunity to
24 address you all.

25 First of all, compliments. I think for a

1 first shot out of the blocks, this is an outstanding
2 piece of work.

3 I think what I'll do is maybe deviate a little
4 bit from Scott's suggestion, since I'm up here
5 following yours, maybe go through my comments, if I can
6 do that.

7 Some general comments, first of all. One of
8 the concerns that I have had is always what is the
9 opportunity for the public to be up to speed with what
10 the Board's doing?

11 Now the agendas come out, and there are
12 documents attached to the agendas sometimes. But when
13 the process gets underway, whatever that process may be
14 under the new evidentiary hearings, documents may be
15 handed out during the hearing.

16 And if you're a member of the public and
17 you're trying to track what's going on, you're at a
18 disadvantage because you're trying to extrapolate that
19 which you've got from the agenda and from the staff
20 reports and that which is being presented in terms of
21 the particular hearing, particular permit, whatever the
22 matter might be.

23 So if there is a way of trying to come up with
24 maybe a protocol or a guideline that would allow either
25 by time or to the extent someone does come up and

1 present documents they're requested to have sufficient
2 copies that can be handed out to the attendees so that
3 we can do a quick study and try to get calibrated into
4 what the discussion is.

5 My other comment would be that in some of the
6 language -- and I'll get into a little bit of it -- I'm
7 always concerned with overbroad language, vague
8 language, ambiguous language.

9 And I think if you use those three metrics, as
10 you kind of go through and do your reading back and
11 forth and evaluate comments that come in, I think some
12 of those will pop out in terms of trying to determine
13 what they mean.

14 An example, my esteemed colleague talked about
15 a joint application. Well, I had that question: What
16 is it? And what are the implications for example in
17 terms of a Lead Agency or Responsible Agency or a
18 Trustee Agency? What are the implications under CEQA
19 or NEPA?

20 And trying to track who's on first, what's on
21 second can be a little bit difficult here. And again,
22 I'm not exactly sure of the principle behind the
23 concept of the joint application.

24 Another general comment would be: I know in
25 your ex parte communication section you tried to make

1 and did a good effort in delineating that which is
2 quasi-judicial, that which is quasi-legislative.
3 That's a confusing area for the best of us. That is an
4 area where you might want to do a little bit more in
5 terms of clarification.

6 Now whether you want to link it to the
7 judicial side of the house as to how actions might be
8 channeled through the Code of Civil Procedure, for
9 example, a 1085 action as distinct from a 1094.5 action
10 gives you some guidance.

11 If you look at those statutes, you might want
12 to extrapolate some language from that that kind of
13 dovetails for those of us that are looking at what
14 you're doing.

15 The general comment there relates to what do
16 you really mean when you're making conclusions or when
17 you're making findings of fact or making
18 determinations? All of those have kind of their own
19 definitions in the administrative law side as well the
20 judicial side.

21 I think it's important that somewhere here in
22 definitions -- and I think there was a reference to
23 definitions, but it wasn't in the packet of material I
24 got off the net.

25 But maybe this is a place that you can be

1 clear as to when, for example, in quasi-judicial a
2 finding is a finding of fact, a determination is a
3 determination, a conclusion is a conclusion. See what
4 I'm saying? So it sort of sets out as almost a
5 syllogism in terms of taking a look at it.

6 I scrambled, Nancy, as you were going through
7 your presentation to make sure that my order of comment
8 was not matching, so please forgive me with a couple of
9 my comments here as I quickly try to catch up with you.

10 SENIOR STAFF COUNSEL FINCH: That's fine.

11 MR. ERES: I think in terms of the evidentiary
12 hearing initial section 13, I thought was well done.

13 I think in terms of the conduct and the order
14 of the hearings, again, I think it's the public's
15 interest in that process which you need to look at.

16 And then I've already talked about
17 availability of documents. I've talked about findings,
18 determinations, and statements, so that will take care
19 of that.

20 I think with respect to, if I may jump to the
21 Consent Calendar, that's always been a little confusing
22 to how the process or protocol for a consent agenda
23 item works.

24 What I mean by that, sometimes things will
25 come out of the consent agenda item, they have

1 documents behind them, or they don't.

2 They always do a calibration here with the
3 opening of the Board session to say do we want to
4 remove things from the consent agenda item, and I think
5 that's a helpful way of doing it.

6 But to the extent you're going to say it's
7 going to move forward as an agenda item and public
8 testimony is waived or public input is waived -- I
9 think that's one of the languages in there, phrases in
10 there -- you might want to take a look at how that fits
11 because that to me was a little bit confusing because
12 you can, as a member of the public, request the Board
13 to remove something from the consent agenda item.

14 Now, if you request it, does that mean it's
15 automatic? Does that mean the Board makes a
16 determination as to whether they want to pull it from
17 consent agenda item and may say no, we don't? And when
18 do you bring up that issue if you choose to do so?

19 Small details, but it would be helpful if the
20 consent agenda item, I think, could have a little
21 better sense of what the intention is, particularly
22 since we're going to be dealing with decisions,
23 evidentiary hearings, and the quasi-judicial actions.

24 Under your basis for denial of application, I
25 think that was fine.

1 Oh, back on ex parte communications. One of
2 the things that's always fascinating for lawyers is to
3 figure out what's a written communication. And this
4 again may be a definitional point you want to address.

5 You made a distinction between written and
6 oral, but I'm not exactly sure whether you might want
7 to do a little more look-see, again going back,
8 overbroad, vague, if it's anything, an X on a piece of
9 paper, fine.

10 The other item was ex parte is going to be
11 very hard, I think, to enforce because, again, the
12 Board's role, quasi-judicial, quasi-legislative, allows
13 a certain amount of flexibility here. And I'm not sure
14 where sanctions come into play, if at all, other than
15 you have them addressed here.

16 An example would be if any Board Member is
17 trying to do fact-finding on its own. Is that Board
18 Member precluded from fact-finding?

19 You have used that term here as a field trip.
20 And if a Board Member wants to go out on their own to
21 take a look at a particular piece of property, and they
22 want to go on the property which happens to be private
23 property, and they want to be prudent and ask for
24 permission to go on the property, is all of this
25 publicly noticed before they can go out and do that?

1 And if while they're on the site and the
2 landowner is there, are they precluded from having a
3 conversation with the landowner?

4 And again, this goes back to what's the
5 trigger. Is it only if a permit is pending or a
6 citation for violation pending?

7 It seems to me that is an area ripe for the
8 proverbial bramble bush in terms of trying to provide
9 assistance to the Board Members and also to the members
10 of the public who may be asked can we go on your
11 property to take a look at a particular easement or
12 levee or whatever the case might be.

13 The other comment I would go into is
14 delegations. And I thought there was discussion about
15 delegations dealing with the Executive to be able to
16 have a certain amount of discretion up to a certain
17 definition.

18 And I saw that that was removed in your
19 suggestions here. It says all permits. And I know
20 you're trying to take it from the other side and say
21 yeah, we're going to handle it from the consent agenda
22 side.

23 Maybe that's the way to do it, but somewhere
24 between discretion with your Executive Officer with the
25 consent agenda and with the notion here that some of

1 these permits that come up are awfully routine, and I'm
2 not sure whether that means legislative cleanup to
3 carve out or not, but in terms of what you're reviewing
4 here, I see that as a potential challenge.

5 My final point, and then I'll sit down, deals
6 with your amendments to section 120(a)(5) levees. The
7 concern there is maybe more again an issue of
8 overbroad.

9 The statement says:

10 The Board may require an easement over a
11 larger area and over any property when
12 it is foreseeable that the proposed
13 activity subject to a permit would be
14 injurious or to interfere with the
15 adopted plan of flood control.

16 Quasi-judicial, quasi-legislative. Is that a
17 result of a permit application, or is that a
18 self-initiated inquiry that the Board undertakes under
19 its inherent authority?

20 If you come up here as an applicant and you're
21 asking for one thing, and you find that the Board all
22 of a sudden says well, I think under injurious and
23 interference we have another standard we want to apply
24 that maybe hasn't been addressed.

25 I think with those comments, again, high

1 compliments; we'll continue to monitor. And if you
2 like, I'll try to put some of these in writing and get
3 them to you, but I think you've got a transcriber, so
4 thank you very much.

5 DEPUTY ATTORNEY GENERAL SMITH: Appreciate it,
6 thank you. Mr. Shapiro.

7 MR. SHAPIRO: Good afternoon, staff and Board
8 Members, Scott Shapiro, here today exclusively on
9 behalf of the Central Valley Flood Control Association,
10 also Three Rivers Levee Improvement Authority and
11 Sacramento Area Flood Control Agency.

12 Also, as you know, I represent a number of
13 other clients, so hopefully I can provide a useful
14 perspective on some of these items.

15 I guess the preliminary point that I want to
16 note, I'm really pleased this exercise is under way.
17 As you yourself noted the regs are a little bit out of
18 date, and getting them updated and addressing some of
19 the very challenges that the Board has run into and
20 staff has run into is wonderful, so I really appreciate
21 the exercise.

22 And I guess I also want to note that I'm in
23 agreement with Dante and also with Tom on their
24 comments. I think they're insightful comments and
25 useful.

1 In particular, the enforcement issue that
2 Dante raised is an issue that I on behalf of clients
3 and the Central Valley Flood Control Association have
4 struggled with this issue of enforcement.

5 Breaking it down to a more specific level, as
6 you all know, on behalf of Three Rivers, we were
7 involved in some discussions between RD784 and
8 Ms. Hofman, Tom Eres' client.

9 And whether you agree with or disagree with
10 whether the fences and cattle should have been on the
11 levee isn't the issue I'm raising here. If you just
12 assumed that there was a desire to remove them, and
13 everyone agreed they should be removed, there's just no
14 enforcement authority.

15 784 doesn't have it. The Board essentially
16 has to go to the Attorney General. And so some sort of
17 more specific enforcement authority to address the
18 issues that Dante indicated would be great, and that
19 would be useful, I think, for all of us.

20 I was disappointed that the scope of the
21 regulations didn't deal with some of the other issues
22 we've talked about in the past.

23 I appreciate Nancy's comment that this is the
24 first phase, and you're talking about a second phase of
25 changes to the regulations; but listening to Deborah go

1 through the schedule, it sounds like we may be nine to
2 12 months away from just finishing the first phase, and
3 I'm guessing you usually don't start the second until
4 the first is done and you may have revisions to make
5 and other distractions.

6 And finally, the summer tends to be kind of
7 the quieter time, you know, less permits we're trying
8 to get out the door because we don't want projects
9 being constructed right away.

10 So I'd really encourage you to expand the
11 scope of the regulation changes. And in particular,
12 and as I've said before, my focus is on the fact that
13 your regulations deal with encroachment permits.

14 And 99 percent of what you issue are
15 encroachment permits, but 99 percent of what you have
16 controversial hearings about are not really
17 encroachment permits. They're improvement permits.

18 And your regulations have standard language
19 and provisions and terms and process, which often
20 doesn't make sense. You address some of that in here.
21 You've started to change that with your hearing process
22 and applications for improvements.

23 But I just really think that now is the time.
24 Do it once. Don't split your energy up and then a year
25 from now we have different priorities, and you're

1 distracted by other things, and the State budget's
2 tough, and we never get to it. So I would implore you
3 to consider doing it.

4 SENIOR STAFF COUNSEL FINCH: Could I just ask
5 you a question on that because I know you and I have
6 had a discussion about this before, and I'm trying to
7 imagine the difference between encroachment permits and
8 let's call it an improvement permit.

9 Do you have an idea of what you would like it
10 to look like? And I'll leave it at that.

11 MR. SHAPIRO: Well, I didn't bring all your
12 regulations with me. I can't be terribly specific
13 about what would be required to be changed in your
14 regulations.

15 But I'll give you an example from the permits
16 themselves, and actually staff has been very
17 representative to this as we've met and talked about it
18 recently.

19 Permits typically say things like: The Board
20 may determine that your encroachment has to be taken
21 out at your own expense. Okay?

22 When the encroachment is defined as the
23 Feather River setback levee, you're not going to say
24 take out the \$110 million setback levee. But we have
25 got bond counsel who are issuing bonds, and they say

1 where are all your permits, and we show them the
2 permits, and they go wait a minute, you might have to
3 take this out? And it really makes them nervous.

4 So it's those kinds of things, just
5 recognizing that the process maybe would be different,
6 that there might be a lot more interest in improvement
7 permits than encroachment permits, that hydraulic
8 modelling standards might be different, a need for
9 modeling, staff reports might be different.

10 It's just thinking that process through. And
11 if you want, I'm happy to meet with you separately and
12 pull out the regs and try to figure out exactly where
13 it would change.

14 SENIOR STAFF COUNSEL FINCH: Thank you.

15 MR. SHAPIRO: So if you'll excuse the
16 point-by-point I would like to take an opportunity to
17 go through and put my comments on the record. My hope
18 is that the comments will help you, as Tom said, in
19 addressing overbroad or ambiguous or vague and
20 tightening it down so when it actually goes to the
21 Board, hopefully there's less significant changes each
22 time and you can adopt something.

23 I'll do these in the order that you handed
24 them to me, Nancy. The first is section 5 delegation.
25 I did not bring the other regulations, the existing

1 regulations, so I'm at a little bit of a disadvantage,
2 but I note that (a)(5) says that you can't delegate
3 matters involving residential development as defined in
4 section 113.

5 And I don't recall how 113 defines residential
6 development, and while I do like being before you
7 sometimes on matters not involving residential
8 development, I'm a little unsure what "matters
9 involving" means; would a permit by definition be a
10 matter involving residential development?

11 I just think the term could be cleaned up to
12 make clear what the intention is.

13 In B, I was surprised at the end of B to see
14 that the Board may delegate to the director of the
15 Department of Water Resources.

16 I may be raising issues that are a little
17 outside of the scope of you're thinking about, but that
18 has not been my understanding of the relationship
19 between the Board and the Department where you would
20 delegate something to the Department -- to the Director
21 of the Department of Water Resources.

22 So I wanted to highlight that to ask if
23 that's -- I know it's old; you are not adding it, but I
24 wanted to ask is it really something that should be in
25 there? Is that the relationship between the Board and

1 the Department now that legislation has said you're
2 separate?

3 Moving to section 5.1, ex parte communication.
4 It struck me that something you might add to the list
5 of procedural matters that can be talked about is
6 agenda items, i.e., what should be agendaized.

7 When meetings are tight and there's limited
8 time, we sometimes need to prevail upon Board Members
9 to express why an item is important and should be heard
10 at a particular meeting. That struck me as something
11 that might safely be a procedural matter but was not
12 explicitly listed.

13 I'll reiterate Tom's comments about can you
14 communicate during a field trip? It doesn't say it in
15 there, yet it didn't seem to me a field trip alone
16 would be ex parte, I don't know if you're implying you
17 could communicate on a field trip.

18 Under sub (f) and sub (g), I think it's just
19 useful to say who has to send the copy of the written
20 communication or who submits the memo.

21 The way it's written, it's in the passive
22 voice, just says shall be accomplished by sending a
23 copy. And it struck me you might have the person who
24 communicated ex parte sending it it's just not clear
25 who has to send it in. So that struck me as a little

1 clarification.

2 Then the same under sub (i) at the end, full
3 disclosure of ex parte communication shall be entered
4 in the Board's record. By whom, would be my question.

5 BOARD MEMBER BROWN: I'm presuming that's the
6 Board Member, Scott. Anything different than that,
7 Nancy?

8 SENIOR STAFF COUNSEL FINCH: I think Debbie
9 will answer that question.

10 DEPUTY ATTORNEY GENERAL SMITH: I do believe
11 that is the intent, but I have noted the ambiguity.

12 MR. SHAPIRO: Jumping to section 13,
13 evidentiary hearings. I thought it was important to
14 note, I think you can have evidentiary hearings for
15 items other than those for which a permit is issued,
16 and you might go back through your process as laid out
17 here to make sure it makes sense where you're not
18 dealing with a permit.

19 For example, if there is an enforcement
20 action, you might have an evidentiary hearing to
21 determine -- take evidence on whether there should be
22 an enforcement action.

23 Everything in your hearing deals with
24 applicants doing this, but there wouldn't be an
25 applicant in that kind of evidentiary hearings. So

1 just to take a look at your terminology to make sure
2 it's logical for the different types of hearings you
3 might have.

4 Jumping ahead to (e)(3). This is the
5 provision that allows the Board and its staff to charge
6 an applicant for the applicant's request to have the
7 meeting be out of Sacramento.

8 If, for example, Three Rivers had an
9 application and wanted everyone to come up to
10 Marysville, you can charge for that.

11 That's not unreasonable to me. Certainly, one
12 makes sense, the traveling expenses; and two, the
13 stenographic expenses.

14 But three is a proportionate share of the
15 compensation of the staff. And that seemed odd to me
16 because if it's here you pay your staff, but if it's at
17 Marysville, then I pay the staff. I don't see why the
18 travel should make the distinction who pays the staff.

19 I see the travel expenses; that's logical.
20 But suddenly, because you're asking that it move, now
21 as an applicant I'm going to potentially pay for ten
22 staff people for the day when they would be free if we
23 had the meeting here. So I thought that was worth
24 taking another look at.

25 Under sub (f), now we're dealing with hearing

1 officers, and it says if the President designates a
2 hearing officer the Board shall ratify the decision of
3 the hearing officer.

4 I wanted to raise the question, is the
5 intention that that word be shall? Is it a requirement
6 the Board ratify the hearing officer's decision? Or is
7 it a requirement that if the Board ratifies it, only
8 then is it effective?

9 And I actually am not sure which way you're
10 going. There's one advantage, shall meaning shall:
11 That way, you don't have another hearing. You don't
12 have your hearing officer and then someone says to the
13 Board well, it says may, and I want to argue against
14 it. So it's more finality.

15 But I also didn't know whether you anticipated
16 it could be appealed to the Board.

17 So just highlighting that ambiguity and defer
18 to your policy-makers as to what the preference is.

19 And under G where says written notice of the
20 hearing is mailed to the applicant and each other
21 party. I'm just not sure how you're going to know who
22 each other party is.

23 So I think we need to think about who you're
24 mailing notices to. Certainly if it's an enforcement
25 action, you might have two parties. But if it's an

1 application, I'm not sure who the other party is.

2 Sometimes you'll know. There will be
3 particular people who have spoken out in meetings. But
4 you wouldn't necessarily know.

5 Then finally on this one under sub (h), I
6 would suggest that instead of the applicant being
7 notified of staff recommendation seven days in advance
8 that the applicant receive the staff report seven days
9 in advance.

10 It has happened once where I was told seven
11 days in advance we're opposing it, but I don't have the
12 staff report for you yet.

13 Now your staff has actually been very good of
14 late getting us staff reports early, so I'm not
15 speaking of anyone in particular. But ten years from
16 now, it would be nice with a new staff to know that not
17 only do you find out you're being opposed but also the
18 basis for the opposition.

19 Jumping ahead to section fifteen. 15 A: The
20 Board may deny a permit if the proposed work could --
21 and then there's a laundry list of items.

22 And I would suggest it should read: If the
23 proposed work, based on evidence from the hearing has
24 been determined to.

25 In other words, I don't want the Board denying

1 a permit because someone says well maybe it could.
2 Seems to me we're having hearings now and you're taking
3 evidence, making findings; the evidence and findings
4 should support the determination.

5 Then down under sub (9), the last basis for
6 denying a permit. I completely agree it needs to
7 reference back to the State Plan of Flood Control. I'm
8 a little concerned about what that means, until 2012.

9 There hasn't been an adopted one yet. Under
10 Paterno, there is a State Plan of Flood Control. The
11 court found it to be an unreasonable one.

12 So arguably under law, there is a State Plan
13 of Flood Control. I'm not sure that's the one you
14 mean. So that would be something to think about.

15 Moving ahead to the definition of levees,
16 Nancy, I think this is your section, section 120(a)(5),
17 I have a few comments on this one.

18 I understand the Board's desire to require an
19 easement over a larger area, and I think at times it
20 often makes sense. A few concerns about the way it's
21 set up, though.

22 It seems to me there needs to be some sort of
23 rational relationship between the Board's concern that
24 the permit will injure or interfere with the adopted
25 Plan of Flood Control and the granting of the easement.

1 One way to achieve that might be just to add at the end
2 of it: If the easement is rationally related to the
3 injury or interference.

4 The second concern is where it references the
5 adopted Plan of Flood Control. We use that term a lot,
6 but I don't know if we really know what the adopted
7 Plan of Flood Control is sometimes.

8 Certainly the Rec Board's -- the Central
9 Valley Flood Protection Board's statutes contemplated
10 that all these districts were coming and handing you a
11 Plan of Flood Control that was adopted, and you were
12 certifying them or accepting them. But we don't have
13 that kind of documentation.

14 So I'm not sure here if this should be the
15 State Plan of Flood Control once that term is defined
16 or if it should be existing facilities of project
17 levees? I'm not sure, but I'm not sure the term is
18 necessarily the right one.

19 And then my final comment is it uses the term
20 subject. It says when it's foreseeable that the
21 proposed activity subject to a permit would be
22 injurious, and I think it's really that the activities
23 authorized by the permit would be injurious, not
24 subject to.

25 My final comments on this section is just a

1 fairness issue.

2 When, for example, Three Rivers was asked to
3 acquire 50 feet next to the levee, we were already
4 investing \$100 million. The idea of asking us to
5 invest a little more and get 50 feet, I didn't like it,
6 but I understood it, and who else was going to do it?
7 So it was a condition, and we did it, and that's fine.

8 But if we break it down to some more basic
9 permits like RD1, just to pick a random number, comes
10 in and says I need to put a new pumping plant in, and
11 the Board looks and says well, go get an easement for
12 50 feet next to it.

13 Is there a relationship there? Is the cost
14 associated with getting the land maybe far in excess of
15 the order of magnitude of the permit?

16 An even more extreme one: A private citizen
17 comes in and says I need to put a new pipe through the
18 levee for my irrigation line, and the Board says okay,
19 get us 50 feet from your neighbor.

20 Well, the private citizen doesn't have
21 condemnation authority. How are they going to do that?

22 So as you think about this issue of rational
23 relationship, it's also worth thinking about whether
24 the applicant is the one to impose the burden on. And
25 sometimes we have State bond funds to do things like

1 this, for the State to go out and get the land. Maybe
2 it doesn't always make sense.

3 Just a few more comments, just about done.

4 Under section 138, I think this is a great
5 section. I think it's very much needed to identify the
6 limits of the Board's authority at times when it wants
7 to limit itself. Obviously, this is all fallout from
8 the River Islands case.

9 Under 138(a), I would suggest that it's not
10 just for the purposes of establishing the area; it's
11 for purposes of establishing or limiting the area.

12 I wouldn't want a court to interpret this as
13 only saying oh, you can go further; you can't take
14 less. And at River Islands, you said we're not going
15 to take the whole pile of dirt. We're going to say
16 we're only going to take the traditional virtual levee
17 section.

18 Then under sub (b), just a reiteration of my
19 previous comments regarding the rational relationship
20 for taking easements between the easement and proposed
21 injury as well as whether it makes sense to ask the
22 applicant to acquire that.

23 So those are my comments. I hope they're
24 useful. I really do appreciate the time you put into
25 these. I think it's really an excellent package.

1 And I very much hope that you would expand the
2 scope to cover the enforcement issue that Dante talked
3 about, some of the other ones he spoke about, as well
4 as this issue of distinction between the enforcement
5 permits and -- excuse me -- encroachment permits and
6 improvement permits.

7 Thanks for your time.

8 DEPUTY ATTORNEY GENERAL SMITH: Thank you very
9 much.

10 Is there anyone else who wants to make
11 additional comments or come up and speak again?

12 Do the Board Members have any questions?

13 VICE-PRESIDENT HODGKINS: I do. Can we chat a
14 minute about the authority necessary for a local
15 district to take action on an encroachment?

16 And I guess what I'm looking for: It seems to
17 me the Board has the authority to determine whether an
18 encroachment is acceptable or poses a hazard to the
19 integrity of the system.

20 If the Board delivers that kind of a
21 determination to a local district, is that significant
22 authority for you to be able to pursue actually
23 addressing the issue, or do you -- what do you need?

24 MR. NOMELLINI: We need that, but we need
25 direction from you to move forward with your authority

1 to control that encroachment. In other words, your
2 regulation is going to trigger that, and you've got to
3 delegate in some fashion that authority to us, or we
4 have to establish it independently.

5 And the way I've always pled them -- and it
6 depends on what you get in opposition -- but we've
7 claimed easement by implied dedication, which is a
8 property right, which says hey, this is our levee, and
9 we try and demonstrate interference with that easement
10 or implied dedicated right.

11 In some cases, we've adopted local I call them
12 regulations or guidelines or whatever, and we've tried
13 to enforce those.

14 And then we've tried to use the general police
15 power, we call it a police power, the Water Code says
16 the board of trustees of a reclamation district has
17 complete authority over the works of the district.

18 In many cases, that gets us by.

19 But with the Board's regulations, particularly
20 with regard to project levees, we've created this
21 situation where you have the authorities or we have
22 specific agreements in place, you know, that -- our
23 agreement to operate and maintain, it doesn't have that
24 tie in there.

25 So where we are today, I'd say you guys say

1 go -- we want you to go enforce it. It would be
2 wonderful if you get the Attorney General, now that we
3 have an actual representative sitting at the table, go
4 do the enforcement.

5 But if they can't do that or they're too busy
6 or whatever and you want the local district to do it,
7 you've got to tell us to do it or come with us and
8 we'll put the lawyers out front or give us the
9 authority, the consent or direction: We hereby direct
10 you to go ahead and seek the removal of that
11 encroachment pursuant to the authorities of the Board
12 and the easement.

13 And we'll plead it, but somebody's got to give
14 some thought as to how you want to do that.

15 That would do it for me. I mean, I've even
16 done it without you. But it isn't -- you know, it gets
17 fuzzier as times goes on.

18 VICE-PRESIDENT HODGKINS: I understand. I do
19 think it's, you know -- I at least for one would like
20 to see the Legislature specifically give the Board the
21 authority to remove a permit after going -- or an
22 encroachment after going through appropriate hearing
23 and to then bill through the property tax bill the cost
24 of removing the encroachment.

25 I don't know whether the Legislature would

1 give us that authority or not. And so I'm interested
2 in understanding, you know, how we can work with the
3 local districts to provide you what you need.

4 If you're willing to put the attorneys up in
5 front and potentially pursue the issue in court, you
6 know, what do we need to do.

7 MR. NOMESELLINI: Well, the authority to put the
8 cost on the tax bill is something that's not there. At
9 least, I haven't looked for it, but it doesn't leap out
10 at me.

11 Your authority to remove encroachments, you
12 have got property rights in the form of easements that
13 require that people have to get permits in order to
14 encroach on those easements, so that's a property
15 right.

16 You also have statutory authority granted
17 under the Water Code, and you have your own
18 regulations.

19 Now one section I cited, somebody in the
20 Legislature wanted to make you make findings before you
21 go out and remove anything other than fences or
22 whatever, those few items I mentioned in my letter.

23 So somebody tried to restrict you
24 legislatively, and that's directed at your ability to
25 just go out and remove without making specific

1 findings; so that was a limitation on your authority
2 rather than an enhancement. But still, you have that.

3 What that does is overshadow us because that's
4 regulating you. And on project levees, you're the
5 primary authority. At least, that's the way we're
6 assuming it, through regulatory and otherwise.

7 I don't know whether you are for sure or not,
8 but that's the regulatory scheme, and the Legislature
9 has restricted use so the implication is we shouldn't
10 be able to do on project levees anything broader than
11 you can do.

12 I would argue the contrary. But every once in
13 a while, I don't win. And this is probably the case I
14 wouldn't win.

15 Anyway we need -- and everybody's honest on
16 these encroachments. So you guys have to either do it
17 and we support you, or if you expect us to do it and
18 you guys are writing us up on it, you're in effect
19 writing yourself up.

20 But we've got to do something about them. We
21 should. And we jointly could do it. Maybe we join
22 together. I don't know.

23 But the problem has been, you know, you've got
24 to rely on the Attorney General to carry out your
25 prosecution of the case. And at least in that one

1 situation, it didn't get done.

2 VICE-PRESIDENT HODGKINS: And it's a bigger
3 issue now with the Corps.

4 MR. NOMELLINI: Well, and the inspection
5 reports. I've got one on District 17 that lists a
6 whole bunch of these things that says hey, you know,
7 this is an unlawful encroachment.

8 My temptation is to send a letter back to you
9 guys saying take care of it. I know that's not very
10 constructive. So we'd like to try and work out a joint
11 effort, at least in the interim, whereby we're either
12 jointly pursuing it or you make it clear you're giving
13 us direction to go do it and authority to rely on your
14 property right as well.

15 Which I think by implication we have. It's
16 just not explicit.

17 And if you put it in a letter that we
18 recognize you have the right to use our property rights
19 or easement authority and enforcement, that would
20 probably be enough to get by.

21 VICE-PRESIDENT HODGKINS: Okay.

22 MR. SHAPIRO: Can I add to Dante's comments?

23 VICE-PRESIDENT HODGKINS: Sure.

24 MR. SHAPIRO: With the exception of the
25 Steinberg bill and AB 105 from about four or five years

1 ago, which you may be familiar with, which specifically
2 authorized districts to adopt urban levee encroachment
3 standards stricter than the Board's standards providing
4 the Board doesn't object -- has that extra provision in
5 there -- with the exception of that, there really
6 aren't any reclamation district statutes that
7 explicitly authorize us to adopt regulations.

8 And I'm actually, I think, with Dante and
9 where he is which is implicitly we have that authority.
10 But there are cases that I'm aware of, actually one
11 going on right now that my firm's involved with, where
12 a landowner has challenged our right to even adopt
13 regulations, saying the Code doesn't say you can do it.

14 So we can't have regulations or enforcement
15 authority to -- or the ability to enforce regulations
16 if we can't have them.

17 And then as Dante said, quite often we don't
18 have the real property rights.

19 I've done a memo analyzing your enforcement
20 authority. And you have the authority, as Dante said,
21 to ask the Attorney General to enforce your standards.
22 And usually it's through public nuisance is the
23 standard in the code, and there's four different places
24 it says that.

25 And I actually believe that now with the new

1 legislation you have the authority to hire a private
2 attorney to enforce those standards because you're
3 explicitly authorized now to hire counsel whereas in
4 the past you weren't.

5 But my guess is your budget doesn't have a big
6 enough pot to hire a private attorney to enforce those
7 standards, so it may be a little meaningless.

8 So if the districts don't have regulations and
9 therefore can't enforce their own regulations, we're
10 being asked to enforce your regulations which is
11 difficult to do because then people say well, the Board
12 should do it. Why are you any more appropriate to
13 enforce the Board standard than the sheriff or the
14 cemetery district or whatever?

15 So I think Dante's idea of you sharing your
16 property rights with us is the best that I've heard.
17 And the idea simply being that the regulations would
18 explicitly note that all real property interests of the
19 Sacramento-San Joaquin Drainage District are made
20 available to the local maintaining agency that has a
21 partnership arrangement with the Board for purposes of
22 operating and maintaining the levees and for -- and to
23 make very clear that -- I don't know what the term is.
24 I don't think it's a licensee.

25 But there's got to be some magic phrase that

1 would allow us to then go into court and say we're
2 enforcing the terms of this easement. This easement is
3 for flood control purposes. Growing grapes on the
4 levee is clearly inconsistent with the flood control
5 purpose. We are enforcing that real property right,
6 and here's a regulation from the Board saying we're
7 allowed to do that. I think that's the concept.

8 VICE-PRESIDENT HODGKINS: Okay. That's very
9 helpful to me, at least.

10 BOARD SECRETARY DOHERTY: I just feel that
11 each levee district has a group, a board of directors,
12 and it was my understanding that if that particular
13 district didn't maintain their levee as required, then
14 no funds would be allowed for flood fighting. Doesn't
15 that bother your people?

16 MR. NOMELENI: We want to maintain the levees,
17 not only because there's no fund for flood fighting,
18 but we don't want them to break.

19 Our landowners -- our trustees are landowners,
20 have to be landowners to be on the board of trustees.

21 We want to enforce. We don't want to have
22 somebody writing on a sheet of paper that we're out of
23 compliance.

24 Where there are nonproject levees, and the
25 Board has not asserted jurisdiction, we have the

1 argument that nobody is asserting jurisdiction
2 therefore logically we should -- Water Code says the
3 board of trustees has the authority. I've been able to
4 do just fine in that arena with the exception of public
5 utilities because they have an override on local
6 government authority.

7 When we get into project levees, we have a
8 different situation. Your Board, the Sacramento-San
9 Joaquin Drainage District, has the primary easements
10 that are of record.

11 We have some. We have some by implication.
12 Sometimes they overlap; generally they don't have a
13 total overlap.

14 And then you have your regulatory scheme that
15 seems to preempt what we, the local maintaining agency,
16 would exert. You know, and therefore you're the
17 commander.

18 You're actually listed as the superintendent
19 in the documents, in the operation and maintenance
20 manual. It's the state board, not the local district,
21 that's called out as being the superintendent in your
22 relationship with the federal government.

23 So those things all come to the forefront when
24 we have to confront the issue, you know, in a
25 well-thought-out piece of litigation.

1 And that needs to be addressed. It needs to
2 be jointly pursued. Or you do it. We want to help.
3 We don't want to be in noncompliance because you're not
4 enforcing, and we recognize just pointing the finger
5 back at the Board doesn't really solve the problem.

6 So we ought to try to figure out a way to get
7 the job done. If we have sufficient enforcement from
8 the Attorney General or you hire a lawyer, fine. We'll
9 step aside, we'll cooperate, we'll just say yeah, man
10 to you.

11 But when you're trying to say it's us, it can
12 be us. But you have got to give us some tools and
13 direction to use in order for us to do the job.

14 And I'm -- not all districts maybe want to do
15 it, but the ones I represent don't want to be in
16 noncompliance, so we want to do it.

17 BOARD SECRETARY DOHERTY: Where is this 17?

18 MR. NOMELENI: 17 is the south part of
19 Stockton, includes Lathrop, Manteca.

20 And don't get the impression it's just that
21 district. I think there are other districts up and
22 down the state, those that have project levees, that
23 have the same problem.

24 Just because I'm kind of a loud mouth on the
25 subject doesn't mean it's only one district. It's a

1 pervasive problem that we have in the structure. The
2 contemplation was kind of mixed. What do we do at the
3 local district? They were there first. The project
4 levee came along, you know.

5 In order to give the nonfederal sponsor
6 assurances of the federal government, the state created
7 the Reclamation Board.

8 They called it a superintendent, then they
9 said it was committee, became the Reclamation Board,
10 you got some law, some regulations.

11 You kind of evolved, not in a perfectly
12 well-thought-out, at least not well-delineated
13 relationship.

14 The agreements -- I attached one to my letter.
15 That's the only agreement I've got for RD17 and the
16 State. And you look at that, see how well that defines
17 our relationship.

18 And it doesn't really do a good job. We've
19 been operating with implication. We've done fine. Now
20 the heat is on us to do a better job, and we don't have
21 the structure in place yet.

22 VICE-PRESIDENT HODGKINS: One thing that I'm
23 not sure the other two Board Members here know that
24 came out of the trip to Stockton is that the Corps has
25 gone through and done their inspection and noted that

1 there are encroachments which in the Corps' opinion are
2 compromising the ability of flood officials to operate,
3 maintain, and flood fight.

4 And the Corps is saying and they have to be
5 corrected.

6 Then FEMA is picking up the Corps'
7 determination that it's compromised the ability to
8 operate and maintain, has said our requirements are
9 that you have to be able to operate and maintain the
10 levee, and so until those are corrected, we are going
11 to decertify the levee.

12 And there are two areas in Stockton, one of
13 them where eight encroachments roughly are potentially
14 going to result in about 7- or 800 homes having to
15 purchase flood insurance at a cost of 800 to \$1,500 per
16 home.

17 And while we can argue the issue of whether
18 they should have flood insurance or not separately, the
19 whole business here of not addressing -- and some of
20 these encroachments are permitted and some of them are
21 permitted with the Corps' approval -- it's going to be
22 become a much more serious issue.

23 The other area, I think, there are potentially
24 10,000 homes. But I think the other area may have
25 problems besides just the problem of the encroachments

1 that are going to put it in the floodplain. I'm not
2 100 percent sure of that.

3 But it is going to become a significant issue.
4 Stockton is going to be the test case. And if in fact
5 the Corps and FEMA deliver what they say they're going
6 to deliver, I think the Board is going to be in the hot
7 seat here with respect to the money that's going out of
8 the community and into the federal flood insurance
9 pool.

10 It is a serious issue for the State.

11 I think also if we have the Corps make this
12 kind of determination and then subsequently there were
13 a levee failure, and we have not done everything we can
14 to enforce our standards and the Corps' standards, I
15 wonder how many more Paterno suits there might
16 potentially be because of the fact that we haven't done
17 correction on encroachment permits.

18 So it's an issue we've got to figure out a way
19 to --

20 MR. NOMELETTI: My comments were solely
21 directed to unpermitted encroachments.

22 Where you have Board permits for encroachments
23 that have to be removed, there has to be some
24 revocation of that permit or buy-back or condemnation.

25 I'm not suggesting we have the capability even

1 if you told us to go ahead and do it. We'd have to
2 work out a very formal agreement as to how we would go
3 and act where you granted a permit.

4 You've got to address that, that issue where
5 you granted the permit through some type of revocation,
6 probably going to get stuck with an adverse
7 condemnation claim or something like that.

8 I'm talking about simply unpermitted
9 encroachments. That's where somebody went out and did
10 something, you didn't permit it, and it's clearly one
11 of these things we should take care of.

12 Those other ones are really complicated.

13 VICE-PRESIDENT HODGKINS: Oh, I thought we had
14 a chance to get it all taken care of.

15 MR. NOMELENI: We've got the Attorney General
16 right here. Let's let her take care of it.

17 BOARD MEMBER BROWN: While we're waiting on
18 resolution with the Corps, Deborah, could like the
19 District 17 request a hearing for our Board for
20 resolution to that issue?

21 MR. NOMELENI: To removing encroachments?

22 BOARD MEMBER BROWN: Sure.

23 MR. NOMELENI: We have not.

24 BOARD MEMBER BROWN: Well, you could.

25 MR. NOMELENI: That's one way to do it, make a

1 formal request?

2 BOARD MEMBER BROWN: Make a formal request for
3 a hearing and let's hear evidence on both sides if
4 there is an issue.

5 MR. NOMELEINI: My inclination, as I indicated
6 to you, was to tell you to get them out because.
7 You've got the authority, they're encroaching on the
8 project levee. We operate and maintain, but we don't
9 have the property rights, and we don't have the --

10 BOARD MEMBER BROWN: It just may be the threat
11 of a hearing by this Board on the issue might bring a
12 resolution to your problem. If it doesn't, then you'd
13 have fallback.

14 MR. NOMELEINI: And request direction?

15 BOARD MEMBER BROWN: Sure. Next time you have
16 that, request a hearing. Let's see what happens.

17 MR. NOMELEINI: We're going to come just for
18 public information on the 20th, but I mean a formal
19 request of some kind could be appropriate. I thought
20 we'd kind of talk it over a little bit, work out a game
21 plan before we start formalizing this lack of clarity
22 in our relationship. But if you're not offended, I'll
23 do it.

24 BOARD MEMBER BROWN: Not at all.

25 MR. NOMELEINI: Okay, thanks.

1 BOARD MEMBER BROWN: Go ahead, Jay.

2 EXECUTIVE OFFICER PUNIA: Jay Punia. Just
3 want to let the public and the Board Members and the
4 staff to know that our legal counsel, Virginia Cahill
5 has tasked in the Attorney General's office to at least
6 document our enforcement procedures so that we have a
7 clear understanding what our procedures are and what
8 the extent of our authority is.

9 So I think we will as soon as we have that
10 work done will present it to the Board and seek other
11 direction too.

12 BOARD MEMBER BROWN: Okay.

13 DEPUTY ATTORNEY GENERAL SMITH: If there are
14 no other comments, I guess I would just leave with the
15 big thing, you've given us a lot to think about and to
16 take back.

17 I'm sure there will be some changes made based
18 on your comments. But keep following the process
19 along, and we appreciate your time.

20 We're adjourned.

21 * * *

22 (Thereupon the STAKEHOLDER MEETING
23 adjourned at 2:13 p.m.)

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9 I further certify that I am not of counsel or
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11 any way interested in the outcome of said meeting.

12 IN WITNESS WHEREOF, I have hereunto set my
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